

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN 13 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0329-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
EDGAR A. AVENDAÑO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR48215

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Edgar Avendaño

Florence
In Propria Persona

E C K E R S T R O M, Judge.

¶1 Petitioner Edgar Avendaño was convicted after a jury trial of burglary, kidnapping, robbery, and theft by control and sentenced in 1995 to concurrent, aggravated prison terms, the longest of which were twenty-one years. On direct appeal, this court affirmed his convictions and sentences. *State v. Avendaño*, No. 2 CA-CR 95-0347 (memorandum decision filed Feb. 6, 1996). Avendaño sought post-conviction relief

pursuant to Rule 32, Ariz. R. Crim. P., in 2001, requesting additional presentence incarceration credit, which the trial court granted. He filed a pro se notice of post-conviction relief and petition in November 2009, challenging his sentences on a variety of grounds, including the allegedly ineffective assistance rendered by his counsel at sentencing. The court denied the petition without an evidentiary hearing and denied Avendaño's subsequently filed motion for reconsideration. This petition for review followed.

¶2 Absent a clear abuse of discretion, we will not disturb the trial court's ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). As the court correctly stated at the end of its order, Avendaño's claims are all precluded because they could have been, but were not, raised in previous post-conviction proceedings, either on appeal or, with respect to the claim of ineffective assistance of counsel, in his first Rule 32 proceeding. He contends on review that he could not have raised these claims before because he was not aware of the errors until 2009, when he obtained certain documents. Assuming his assertions are true, however, they do not exempt him from the preclusive effect of Rule 32.2. *See State v. Petty*, 225 Ariz. 369, ¶ 10, 238 P.3d 637, 640-41 (App. 2010) (explaining defendants seeking to raise non-precluded claims in untimely or successive petition may do so if able to state meritorious reasons for failing to assert claims in timely manner or in previous proceeding). Here, while Avendaño may not have been aware of certain documents, he has not established that he exercised due diligence in acquiring those documents. Indeed, the substantial lapse in time between the instant

post-conviction petition and his first one, filed in 2001, suggests otherwise. Avendaño has not established the trial court abused its discretion in finding his claims precluded.

¶3 The trial court addressed the merits of Avendaño's claims in any event, finding they were not colorable. We adopt the court's order because the court clearly identified and correctly resolved the claims, and Avendaño has not sustained his burden on review of establishing the court abused its discretion. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶4 We grant Avendaño's petition for review but for the reasons stated herein, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge